

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 19, 2006

STATE OF TENNESSEE v. ROBERT MORRISON

Appeal from the Circuit Court for Franklin County
No. 16091 J. Curtis Smith, Judge

No. M2005-02282-CCA-R3-CD - Filed September 12, 2006

The defendant, Robert Morrison, appeals from his Franklin County conviction of possession of drug paraphernalia, a Class E felony, for which he was sentenced to serve two years of split confinement, consisting of 120 days in the county jail and the balance on probation with a special condition that he meet the requirements of the community corrections program. In this appeal, the defendant claims that (1) his conviction is not supported by sufficient evidence, (2) the trial court erred in failing to suppress his pretrial statement, and (3) the trial court erred in admitting evidence that a methamphetamine lab had been confiscated at the defendant's house on a prior occasion. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which ALAN E. GLENN, J., and J.S. DANIEL, SR. J., joined.

Philip A. Condra, District Public Defender, and Quisha A. Light, Assistant Public Defender, for the appellant, Robert Morrison.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; James Michael Taylor, District Attorney General; and William Bobo Copeland, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant's conviction arises from his possession of Coleman fuel, pseudoephedrine, and plastic tubing. According to the evidence at trial, these items are commonly used in the manufacture of methamphetamine.

At trial, Officer Danny Mantooth of the Winchester Police Department testified that he routinely patrols Wal-Mart to observe individuals who are purchasing items used in

methamphetamine production. On July 20, 2004, he saw the defendant leave Wal-Mart with a gallon of Coleman fuel. He followed the defendant to Dollar General Store and through binoculars observed the defendant purchase two boxes of pseudoephedrine. Officer Mantooth left the scene in order to avoid detection, and Officer George Dyer of the Franklin County Sheriff's Department took over surveillance of the defendant. Officer Mantooth later assisted Officer Dyer in stopping the defendant for questioning. The defendant had the fuel, pseudoephedrine, and plastic tubing in his car. Officer Dyer took the defendant to the police department. Officer Mantooth testified that he advised him of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). The officers took a statement from the defendant, which was not recorded or memorialized in writing. According to Officer Mantooth, the defendant said that he purchased the items for two individuals, William Perkins and Scottie Stewart. The officer testified that Perkins was known to have been "cooking" methamphetamine and that Stewart was under investigation. Mantooth also said that the defendant told the officers that he had been on his way to another store to purchase two more packages of pseudoephedrine when they had stopped him. According to Officer Mantooth, the defendant said "that if we could help him out he would help us out" by delivering the items to Stewart. The officers, however, declined this arrangement. The defendant told the officers that he had seen a methamphetamine lab the previous evening in an outbuilding at Stewart's home. Officer Mantooth also testified how each of the items recovered could be used in making methamphetamine.

Officer George Dyer of the Franklin County Sheriff's Department testified that Officer Mantooth called him to assist in surveillance of the defendant. He arrived in time to see the defendant leaving an aquarium shop, and he stopped the defendant and found him in possession of Coleman fuel, pseudoephedrine, and tubing. After Officer Mantooth advised the defendant of his rights, the defendant said that he was not the "cook" and asked whether the officers would help him. Officer Dyer told him they might be able to help him and would talk to the district attorney. The defendant named Perkins and Stewart as the "cooks" and claimed a methamphetamine lab was in a garage on Stewart's property. Officer Dyer went to the property, but he did not find anything.

Jeremy Morrison, the defendant's nephew, testified that sometime in the summer of 2004 he had asked the defendant to purchase some clear tubing for him. Jeremy Morrison said that he was having a party and wanted to make a beer bong. The defendant later reported to his nephew that the tubing he had purchased had been confiscated.

The defendant testified that he had been at Scottie Stewart's house and had mentioned that he was going to the Co-op to buy horse feed. Stewart asked him if he would purchase Coleman fuel and "cold pills" for him while he was in town. The defendant claimed he went to Wal-Mart and bought the Coleman fuel. He looked for some "hose pipe" for Jeremy Morrison, but Wal-Mart did not have the correct size. He then went to Dollar General and bought two packs of cold pills, one for Stewart and one for himself. After leaving Dollar General, the defendant went to an aquarium store and purchased twelve feet of five-eighths-inch hose. He was stopped by the police and taken "downtown" for questioning.

The defendant testified that the officers told him they would not arrest him and seize his car if he would tell them what he was doing. He said he told the officers he had purchased the Coleman fuel and one pack of cold pills for Stewart. He told the officers he customarily kept the pills in his car because his fiancée had allergies. He told them that he purchased the tubing for his nephew. According to the defendant, he did not tell the officers anything about Stewart making methamphetamine and Perkins' name was never mentioned. The defendant denied any knowledge of the methamphetamine manufacturing process other than what he heard during the trial. The defendant admitted on cross-examination, however, that a methamphetamine lab had been confiscated from his residence in June 2002. He claimed that unbeknownst to him, a renter had set up the lab in the basement.

The jury found the defendant guilty of felony possession of drug paraphernalia and assessed a \$5000 fine. The trial court imposed a two-year split confinement sentence, of which the defendant was ordered to serve 120 days in the county jail. This appeal followed.

I

The defendant challenges the sufficiency of the convicting evidence. Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The indictment charges the defendant with possession of drug paraphernalia “with the intent to deliver said drug paraphernalia, knowing, or under the circumstances where one reasonably would know, that it would be used to manufacture, produce, process, or prepare . . . methamphetamine[.]”

The relevant statute provides in pertinent part

[I]t is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body in violation of this part.

T.C.A. § 39-17-425(b)(1).

“Drug paraphernalia” means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body, a controlled substance

Id. § 39-17-402(12).

In determining whether a particular object is drug paraphernalia as defined by § 39-17-402, the court or other authority making such a determination shall in addition to all other logically relevant factors consider the following:

- (1) Statements by the owner or anyone in control of the object concerning its use;
- (2) Prior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances;
- (3) The existence of any residue of controlled substances on the object;
- (4) Instructions, oral or written, provided with the object concerning its use;
- (5) Descriptive materials accompanying the object which explain or depict its use;
- (6) The manner in which the object is displayed for sale;
- (7) The existence and scope of legitimate uses for the object in the community; and
- (8) Expert testimony concerning its use.

Id. § 39-17-424.

In the light most favorable to the state, the evidence establishes that the defendant had Coleman fuel, pseudoephedrine, and plastic tubing in his possession, all of which are items used in the manufacture of methamphetamine. The defendant claimed to have purchased the items for William Perkins and Scottie Stewart and told the officers that Perkins and Stewart, not he, were the methamphetamine “cooks.” The defendant claimed to have been on his way to purchase additional packages of pseudoephedrine when he was detained. He claimed to have seen a methamphetamine lab the previous evening in an outbuilding on Scottie Stewart’s property.

The state offered testimony regarding the use of the items in question in the methamphetamine making process. The state also offered evidence of the defendant’s inculpatory statements on the day he purchased the items. The defendant, on the other hand, offered his own

testimony and that of his nephew regarding legitimate uses of the items in question. However, the jury was entitled to reject the credibility of the defendant and his nephew in favor of that of the state's witnesses. Viewing the evidence in the light most favorable to the state, a rational juror could conclude beyond a reasonable doubt that the defendant possessed drug paraphernalia with the intent to deliver, knowing that it would be used for manufacturing methamphetamine.

II

The defendant claims the trial court erred in denying his motion to suppress the pretrial statement he gave to Officers Mantooth and Dyer because the state did not reveal the existence and substance of this oral statement until six days before the trial, which impaired preparation of the defense and plea bargaining opportunities. The state counters that the defense should have pursued a motion for continuance in the trial court if it needed more time to prepare, rather than pressing forward on a motion to suppress, which the trial court ultimately denied.

The evidence relative to the statement's disclosure is by no means conclusive. Both the public defender who represented the defendant at trial and the district attorney who prosecuted the case conceded that the case had been handled by others in their respective offices at earlier stages of the proceedings. Neither could say definitively that the information about the defendant's oral statement had not been disclosed in earlier proceedings when others were handling the case. The parties could agree that the information had been disclosed six days before the trial by the state to the public defender who represented the defendant at trial. The defense filed a written motion which sought (1) a continuance and/or suppression of the statement based upon its untimely disclosure, and (2) suppression of the statement because it was taken in violation of the defendant's Miranda rights. The trial court heard the motion and denied it before the trial began. Although the court did not make specific findings relative to the defense request for a continuance, the defense did not specify the prejudice resulting from a lack of a continuance, and it did not make a post-trial showing of actual prejudice which befell it at the hearing on the motion for new trial. The court accredited Officer Mantooth's testimony at the suppression hearing that the defendant waived his Miranda rights before making his statement, and we note the defense did not offer any countervailing proof at the motion hearing.¹

If a party fails to comply with a discovery request, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2). Whether a defendant has been prejudiced by the state's failure to disclose information is a significant factor in determining an appropriate remedy. State v. Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995). When arguing that the state violated Rule 16, the defendant bears the burden of showing "the degree to which the impediments to discovery hindered trial preparation and defense at trial." State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992).

¹The defendant later testified at the trial that he was not advised of his Miranda rights before he made the statement. Both Officers Mantooth and Dyer testified to the contrary at trial.

In the present case, the question whether the public defender's office had been advised of the defendant's oral statement to Officers Mantooth and Dyer was never resolved. The defense never made any showing of actual prejudice which hindered its trial preparation and presentation of a defense. Certainly the attorney from the public defender's office who represented the defendant at the trial was unaware of the defendant's statement until shortly before trial. However, we do not know whether the fault lies at the feet of the state for failing to disclose the evidence to the public defender's office or at the feet of the public defender's office for failing to document or communicate a disclosure that was pertinent to trial preparation by the attorney who tried the case. In these circumstances, and without a showing of actual prejudice to the defense, we are unconvinced that the trial court should have granted a continuance.

The question that remains is whether the trial court properly denied the motion to suppress. To the extent the defendant argues that suppression was the proper remedy based on the alleged tardy disclosure of the defendant's statement, we are unpersuaded. The defendant has not even established that the defense was not notified of the statement in a timely manner. Even if we assume that there was no timely disclosure of the statement, the defendant has made no showing of any specific prejudice resulting from the time of disclosure. He claims he would have had more time to prepare for a suppression hearing, to file other pretrial motions, and to negotiate a settlement, but he has not made any showing why more time was necessary for preparation for a suppression hearing, what additional motions he might have filed, and whether he had or would have considered a settlement had his trial attorney been aware of the statement at an earlier date. With respect to the merits of the suppression motion itself, the state offered evidence at the continuance/suppression hearing and trial that the defendant was advised of his Miranda rights. Although the defendant testified otherwise at trial, the trial court accredited the testimony of Officer Mantooth at the suppression hearing. In light of the defendant's contrary testimony at trial, we note that the trial court was not persuaded at the motion for new trial to reverse its prior ruling. On appeal, the defendant has not demonstrated any error requiring us to reverse the trial court's ruling.

III

The defendant contends that the trial court erred in allowing the state to cross-examine the defendant about a prior discovery of a methamphetamine lab in the basement of his home. The defendant claims this evidence was inadmissible under Tennessee Rules of Evidence 404(b) and 608. The state counters that its cross-examination was proper to rebut the defendant's misleading claim on direct examination that he knew nothing about how to make methamphetamine other than what he had heard in trial testimony.

The following direct examination testimony of the defendant forms the predicate for this issue.

- Q. Now but you told [Officers Mantooth and Dyer] you were picking up the items, the two items, for a Scottie Stewart?
- A. Yes, ma'am, I did.

- Q. Did you know how to make meth?
A. Just what I heard here today.

At the request of the state, the court ruled that in light of this testimony, the state could inquire about the defendant's knowledge of methamphetamine manufacturing, but the focus must be on that aspect and not on any convictions incidental to such knowledge. The state then asked the defendant about his knowledge of making methamphetamine. He admitted that a methamphetamine lab had been removed from his home, but he claimed it had been placed there by someone who was renting a room from him and that he had no knowledge of it prior to its discovery.

Tennessee Rule of Evidence 404(b) prohibits the introduction of evidence of other crimes or acts, except when the evidence of other acts is relevant to a litigated issue, such as identity, intent, or motive, and its probative value is not outweighed by the danger of unfair prejudice. The rule states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

The trial court considered in a jury-out hearing whether the state would be allowed to cross-examine the defendant about the prior discovery of a methamphetamine lab in his home in order to rebut his claim that he knew nothing about manufacturing methamphetamine other than what he had learned in court. The defendant did not dispute that this had taken place. Rather, he contended that the evidence was not probative because it did not show that he knew anything about making methamphetamine and that the evidence was unfairly prejudicial because the lab was not his and he had been unaware that it was in his basement until a third party discovered it. He argued that he had ultimately been convicted of possession of methamphetamine, but the manufacturing

methamphetamine charge against him had been dismissed by the state. The court ruled that the defendant had opened the door to cross-examination about the prior discovery of a methamphetamine lab in his home by his broad profession of ignorance of the methamphetamine manufacturing process. In consideration of the concerns about prejudice versus probative value, the court ruled that “[t]he thrust of the cross examination has to be the knowledge, not particularly focusing on convictions because that’s – that may be incidentally part of this, of the questioning, but the thrust has to be what knowledge.” When the defendant was cross-examined on this point, he was allowed to explain the situation and his claimed lack of involvement in it.

We hold that the trial court did not abuse its discretion in allowing this cross-examination. The defendant claimed to have no knowledge of methamphetamine manufacturing. Rule 404(b) allows proof of prior bad acts to show guilty knowledge if that knowledge is a material issue. See Tenn. R. Evid. 404(b); Collard v. State, 526 S.W.2d 114, 144 (Tenn. 1975) (holding that prior bad act evidence may be admitted under proper circumstances to show “(1) motive, (2) intent, (3) guilty knowledge, (4) identity of the defendant, (5) absence of mistake or accident, and (6) a common scheme or plan for commission of two or more crimes so related to each other that proof of one tends to establish the other”). Whether the defendant possessed Coleman fuel, pseudoephedrine, and plastic tubing for manufacturing methamphetamine or whether he possessed them for other reasons was a material issue in this case. Whether he had knowledge of how to manufacture methamphetamine was a relevant and material inquiry, made all the more so by the defendant’s claim he knew nothing about the process.

The defendant also claims that the impeachment was improper under Rule 608(b). Evidence of conduct involving dishonesty may be inquired into on cross-examination of a witness if certain conditions are met. See Tenn. R. Evid. 608. Rule 608 provides,

(b) Specific Instances of Conduct.— Specific instances of conduct of a witness for the purpose of attacking or supporting the witness’s credibility, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness’s character for truthfulness or untruthfulness The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) The court upon request must hold a hearing outside the jury’s presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry.

The rule also provides that the conduct generally must have occurred within ten years and that an accused in a criminal prosecution is entitled to reasonable written notice of the state’s intent to

impeach him prior to trial, and the court must rule whether the impeachment will be allowed prior to trial, or at least prior to the accused's testimony. Tenn. R. Evid. 608(b)(2), (3). Under the rule, if a witness denies the conduct, the examiner may not prove the conduct through extrinsic evidence. See State v. Shepherd, 862 S.W.2d 557 (Tenn. Crim. App. 1992). Additionally, the Advisory Commission Comments to Rule 608(b) provide, "If the witness makes a sweeping claim of good conduct on direct examination, that claim may open the door to cross-examination without pretrial notice and with a lower standard of probativeness, as rebuttal of the broad claim would itself tend to show untruthfulness." Tenn. R. Evid. 608(b), Advisory Comm'n Cmts.

We hold that Rule 608(b) does not govern the inquiry here. First of all, the evidence was admissible as extrinsic evidence under Rule 404(b). Therefore, it was not necessary that the inquiry be restricted under Rule 608(b). Additionally, the specific conduct in question – the presence of a methamphetamine lab in the defendant's home – is not highly probative of the defendant's character for truthfulness or untruthfulness. Possession of a methamphetamine lab is not a crime which involves inherent dishonesty. Cf. State v. Waller, 118 S.W.3d 368 (Tenn. 2003) (holding that probative value of prior drug convictions to impeach defendant's credibility does not outweigh prejudicial effect of admission of evidence in drug prosecution, applying Tennessee Rule of Evidence 609). Further, the evidence was admissible as rebuttal evidence. As the comments to Rule 608(b) note, an opposing party is allowed to rebut a witness's sweeping claim of good conduct by cross-examining the witness with specific instances of conduct which are contrary to the claim. In the present case, the defendant claimed he knew nothing about manufacturing methamphetamine other than what had been the subject of testimony in his trial. The state was properly allowed to impeach this sweeping claim of good conduct by asking the defendant whether a methamphetamine lab had been taken from his home by the authorities on an earlier occasion.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, JUDGE